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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 298.

ISBRANDTSEN COMPANY, INC., MICHAEL GOLODETZ, NATHAN GOLODETZ, ABRAM G. GOLODETZ, JOACHIM GINZBERG, SIMON GOLODETZ, LAZAR GOLODETZ, MARK GINZBERG, JURA GINZBERG, and EFRIM GOLODETZ, co-partners doing business under the firm name and style of M. GOLODETZ & COMPANY, ANTONY GIBBS & CO., INC., SOCIEDAD TRADING CORPORATION, L. W. & P. ARMSTRONG, INC., MENTE & CO., INC. and AMERICAN SUGAR REFINING COMPANY,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITIONERS' REPLY BRIEF.

ARTHUR O. LOUIS,
Counsel for Petitioners,
96 Fulton Street,
New York 38, N. Y.

HILL, RIVKINS, MIDDLETON, LOUIS & WARBURTON,
GREGORY S. RIVKINS,
JOSEPH T. MCGOWAN,
Of Counsel.

Parkside Press, Inc., 79 Thomas St., New York 7, N. Y., U. S. A.

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PETITIONERS' REPLY BRIEF.

Respondent's brief effectively concedes the proposition which always has been the law on a subject of the greatest importance to those engaged in transportation and foreign trade. It is that a suit for breach of a contract to procure insurance in a maritime venture states a non-maritime cause of action and admiralty cannot take jurisdiction.

It nevertheless argues,—*unsupported by citation of a single authority*—that where the contract to insure is not an independent undertaking or is incidental to or part of a maritime contract, it becomes an admiralty cause. That contention has been struck down by this court, the Courts

of Appeal for the Fifth and Ninth Circuits, the Court of Claims, the District Courts and earlier by the Court of Appeals for the Second Circuit itself. The cases are cited and quoted from at pages 5-8 of the petition. As of today, the only court which has adopted the position taken by the respondent is the Court of Appeals for the Second Circuit and that was done only in the present litigation,—the court having previously pointedly expressed itself to the contrary.[1] Thus there now is a sharp conflict between the circuits on this important subject despite the respondent's opposite suggestion in its brief.

In the cases cited in the petition the underlying contract was maritime, yet the provisions for procuring insurance were held to be non-maritime. Those decisions uniformly hold that an obligation to insure, whether it is an incident to a maritime contract or stands alone, cannot be decided in the admiralty.

The same argument as is here presented by the respondent was made by it in D. C. Andrews & Company, Incorporated *v.* The United States[2] and emphatically rejected by the Court of Claims. (See pages 6 and 7 of the petition). That case held an agreement to procure insurance, part of a maritime contract, nevertheless was non-maritime,— precisely petitioners' position. The principal authority relied upon by the Court of Claims was Plummer *v.* Webb[3] where Justice Story said "some ingredients of a maritime nature" are not a "sufficient foundation for admiralty jurisdiction" where the contract is mixed maritime and non-maritime. He went on to say that to have admiralty jurisdiction "The substance of the whole con-

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[1] *Oosterhoudt* v. *Hedger Transp. Co.*, 54 F. 2d 282, 284.

[2] 124 F. Supp. 362, 363, 365.

[3] 19 Fed. Cas. pages 891, 894, No. 11,233, 4 Mason 380.

tract must be maritime". Here the obligation to insure indisputably was non-maritime.

Another case directly contrary to respondent's argument that to exclude admiralty jurisdiction the contract to insure must be an undertaking either independent of the underlying contract or not an incident thereof is the holding in the Second Circuit that "* * * the breach of a promise to insure, *even when an incident to a contract otherwise maritime*, is not justiciable in the admiralty. * * *"[4] (emphasis supplied).

Nor is there any factual or legal merit in the respondent's contention there is no conflict between the circuits. Not a case is cited in contradiction of petitioners' point, based on the cases cited, that with its holding in this case and its predecessor[5] the Second Circuit now is in conflict with its own commitment which it previously chose not to alter[6] and the basic law laid down by this court, the Fifth and Ninth Circuits and the Court of Claims. (See pages 6-8 of the petition.) Every one of those courts held, where the controversy involved an obligation to insure, that it was non-maritime regardless of whether it was an independent contract or an integral part of or an incident to a maritime contract.

In footnote 2, page 5, of respondent's brief an attempt is made to excuse the failure to insure. But the District Judge rejected it. He held:[7]

> "While the lack of cable communication at the time general average proceedings were set in motion

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[4] *Osterhoudt* v. *Hedger Transp. Co., supra.*

[5] *L. W. & P. Armstrong, Inc.* v. *The Mormacmar*, 75 F. Supp. 520; 93 F. Supp. 930; 196 F. 2d 752.

[6] *Osterhoudt* v. *Hedger Transp. Co., supra.*

[7] *L. W. & P. Armstrong, Inc.* v. *The Mormacmar*, 75 F. Supp. 520, 521.

> on February 17th, before the fire, may explain the failure of the general average adjusters to follow the usual custom and practice of placing such insurance, as their information indicated the cargo consisted of ore and they had no other information to go by, there were at the time in Wellington representatives of the vessel and of the respondents, Moore-McCormack Lines, Inc. and War Shipping Administration. If these representatives lacked authority to place such insurance, this lack of authority was due to the failure of respondents to take the steps which they should have taken in the premises. Furthermore, the general average adjusters, prior to the fire, communicated with the War Shipping Administration and 'pointed out to them that if there was commercial cargo involved it should be insured because it was being put ashore'."

In footnote 8, page 10, of respondent's brief Rule 10(c) of the York-Antwerp Rules, 1924, in effect in 1943 when this matter arose, is misquoted. It is there quoted as providing insurance *reasonably* incurred was a proper charge in general average. The word "reasonably" does not appear in the 1943 text.

In the same footnote respondent suggests it was a matter of its choice whether the insurance should be effected. That is not so,—it was a matter of unavoidable duty and indisputably established custom. John C. Coles, the average adjuster who prepared the statement of general average in this case, testified on the trial in L. W. & P. Armstrong, Inc. *v.* The Mormarmar, *supra:*

> "A. So then I communicated the same day with the War Shipping Administration and pointed out to them that if there was commercial cargo involved it should be insured because it was being put ashore and I wanted to arrange any insurance that was required."

* * * * * *

"Q. What kind of insurance? A. The kind of insurance you usually buy on cargo put ashore, which would cover fire, collapse of structures and rising of navigable waters. It is customary to always take out that kind of insurance in this kind of a situation. I never saw a case before where we did not have insurance—"

Conclusion.

As it abundantly appears the Court of Appeals for the Second Circuit by its decision in this case has created a serious conflict in the Circuits on an important point of civil and maritime law, certiorari should be granted and the matter passed upon by this court.

Dated: September 6, 1956.

Respectfully submitted,

ARTHUR O. LOUIS,
Counsel for Petitioners,
96 Fulton Street,
New York 38, N. Y.

HILL, RIVKINS, MIDDLETON, LOUIS & WARBURTON,
GREGORY S. RIVKINS,
JOSEPH T. McGOWAN,
Of Counsel.